Asian Bank said at page 516 on the functions of the appellate court:

"But where the appeal raises a question of law, this court may be more ready to interfere. Moreover, at least since *Cow* v. *Casey* [1949] 1 All E.R. 197, [1949] 1 K.B. 474, this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under Ord. 14, even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand.' It may offend against the whole purpose of Ord. 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal."

It should be noted however that Goff L.J. was cautious in his language when he said where *"a clear-cut issue"* is raised and *"when full argument has been addressed to the court."* For it may offend the purpose of Order 14 for the court not to decide a case which raises a clear-cut issue of law and when the court has the benefit of full argument. We alluded earlier to the issues raised in paragraphs 4 and 12 of the statement of defence which in our view are factors making this case not an appropriate one for summary judgment.

The underlying philosophy in the Order 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

We accordingly allowed the appeal and also directed the trial to be before another judge.

Costs to the appellants here and below. Deposit to be refunded to the appellants.

Appeal allowed.

Solicitors: *Khoo & Sidhu; Azim, Ong & Krishnan.*

GOVERNMENT OF MALAYSIA & ANOR. v. JAGDIS SINGH

[S.C. (Seah, Hashim Yeop A. Sani & Wan Hamzah S.C.JJ.) September 24 & December 19, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 138 of 1986]

Revenue Law – Income Tax – Notices of additional assessment of income tax – Application for order of certiorari to quash the said notices of additional assessment – Whether certiorari would issue where there is alternative remedy of appeal open – Best judgment assessment made by the Director General of Inland Revenue – Onus to prove that additional assessments are excessive or erroneous is on taxpayer – Allegation of malicious and vindictive acts not proved – Income Tax Act, 1967, ss. 81, 91(1), 103(3) & 120.

Administrative Law – Additional assessments of income tax – Notices – Application for order of certiorari to quash notices – Whether certiorari would issue where there is alternative remedy of appeal open – R.H.C. 1980, O.53 r.1(2).

In this case the respondent had received notices of additional assessment for income tax for the years 1979 to 1984 inclusive. The respondent's accountant wrote to the Department of Inland Revenue, Ipoh, informing them of the respondent's desire to appeal against the additional assessments. However the respondent filed a notice of motion for an order of certiorari to quash the said notices of additional assessment. The grounds relied on by the respondent were "that the notices of assessment are based on conjecture and have been issued maliciously and as a vindictive act." The learned Judge of the High Court granted the respondent's application. The appellants appealed.

Held, allowing the appeal: (1) the discretion is still with the courts to act by way of judicial review but where there is an appeal provision available to the applicant, certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice;

(2) in this case as the Inland Revenue Department was unable to make a proper assessment of the respondent's tax because of the failure of the respondent to comply with the various notices issued to him, the Department was entitled to compute the tax under section 91(1) of the Income Tax Act, according to the best of the Director-General's judgment;

(3) the onus of proving to the Special Commissioners on appeal that the additional assessments are excessive or erroneous lies on the respondent;

(4) there was no evidence to support the allegations of malice and vindictiveness. The onus is on the respondent to prove the allegations he made in his statement in support of the notice of motion and in this case the respondent had not discharged the burden.

Cases referred to:

(1) *Melayu Raya Press Ltd.* v. *W.L. Blythe, the Colonial Secretary* [1951] M.L.J. 89.

(2) *Badah bin Drani* v. *Tan Kheat* [1953] M.L.J. 67.
(3) *Re applications of Chong Fye Lee and Toong Hing Loong Tin Mining Co. Ltd.* [1965] 1 M.L.J. 59.
(4) *Hongkong and Shanghai Banking Corporation, Ipoh* v. *Rent Tribunal for Ulu Kinta* [1972] 1 M.L.J. 70.
(5) *Lai Cheng Cheong* v. *Sowarathnam* [1983] 2 M.L.J. 113.
(6) *The King* v. *Wandsworth Justices* [1942] 1 K.B. 281.
(7) *Anisminic* v. *Foreign Compensation Committee* [1969] 2 A.C. 147.
(8) *Regina* v. *Special Commissioners of Income Tax (Ex parte Morey)* (1972) 49 T.C. 71.
(9) *Baldwin & Francis* v. *Patents Appeal Tribunal* [1959] A.C. 663, 695.
(10) *R.* v. *Chief Constable of Merseyside* [1986] 1 All E.R. 257.
(11) *R.* v. *Epping and Harlaw General Commissioners* [1983] 3 All E.R. 257.
(12) *Preston* v. *I.R.C.* [1985] 2 All E.R. 327; [1985] A.C. 835, 862.
(13) *Commissioner of Income Tax, Central and United Provinces* v. *Laxminarain Badridas* (1937) 5 I.T.R. 170.

SUPREME COURT.

Abdul Hamid bin Haji Mohamed (Senior Federal Counsel) (*Abdul Karim bin Jalil*, Federal Counsel, with him) for the appellants.

Raja Abdul Aziz Addruse (*C.V. Das* with him) for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the Judgment of the Court): On October 11, 1985 the respondent received notices of additional assessment of income tax for the years 1979 to 1984 inclusive the total amount being more than $1 million. On October 25, 1985 the respondent's accountant wrote to the Department of Inland Revenue, Ipoh informing them of the respondent's desire to appeal against the six additional assessments submitting six Q Forms duly completed (35, 37, 39, 41, 43. 45) (Part B, page 11). On November 14, 1985 the respondent filed a notice of motion pursuant to leave granted on October 24, 1985 for an order of certiorari to quash the said notices of additional assessment.

The grounds relied on by the respondent are to be found in paragraph 3 of the statement under Order 53 rule 1(2) of the Rules of the High Court (Part B, page 8) which reads:

"3. Grounds on which relief is sought – That the notices of assessment are based on *conjecture* and have been issued *maliciously* and as a *vindictive* act." (emphasis provided)

On April 22, 1986, the learned judge granted the respondent's application. This appeal is against that order.

In his written judgment the learned judge was clearly of the opinion that *certiorari* was available to the applicant and that the additional assessments were "arbitrary" (Part A, page 37) and not authorised by section 91(1) of the Income Tax Act 1967 and the figures were arrived at by "conjecture and surmise" (Part A, page 34). It would also appear that the learned judge was satisfied that the additional assessments were made maliciously and vindictively because of the strained relationship between the respondent and the second appellant which according to him culminated in the raid on the respondent's office by the Income Tax Department on August 2, 1984 led by the second appellant (Part A, page 9).

The first question posed to us was put in the following way, that is whether *certiorari* would issue where as in this case there is an alternative remedy open to the respondent to appeal to the Special Commissioners under the Income Tax Act which appeal in the present case is pending.

The first principle to note is that certiorari is a discretionary remedy primarily concerned with the prevention of excess or abuse of power rather than the final determination of individual rights. The jurisdiction is sometimes referred to as an "extraordinary" original jurisdiction of the High Court, supervisory in character rather than appellate or revisionary (see Professor *Jain's* Administrative Law of Malaysia and Singapore, page 360).

There is said to be a subsidiary rule to the effect that certiorari is not normally issued if the applicant has an alternative remedy available to him because the rationale is that he should first make use of the domestic remedy provided for him instead of invoking the writ jurisdiction.

Encik Abdul Hamid, Senior Federal Counsel, submitted that the courts in this country have been consistent in refusing to grant an order of certiorari where an applicant had not exhausted the domestic remedy available to him. He cited *Melayu Raya Press Ltd.* v. *W.L. Blyth the Colonial Secretary*[1] where an applicant for an order of certiorari to quash an order made by the Colonial

Secretary withdrawing a licence granted to a company for keeping and using a printing press was refused because the applicants had not exhausted their right of appeal. He also cited *Badat bin Drani* v. *Tan Kheat*[2] where an application for an an order of certiorari to quash an order of Rent Board was dismissed on the ground that the applicant had failed to avail himself of the normal remedy of appeal to the High Court. Similarly in *Re Applications of (1) Chong Fye Lee & (2) Toong Hing Loong Tin Mining Co. Ltd.*[3] where an application for an order of certiorari to quash orders of the warden of mines, Johor was refused because the applicant could have appealed but did not. Also cited was the *Hong Kong and Shanghai Banking Corporation, Ipoh* v. *Rent Tribunal for Ulu Kinta*[4] where an application to quash an order of Rent Tribunal was dismissed by the High Court and the appeal was also dismissed by the Federal Court. In that case both the High Court and the Federal Court refused to issue certiorari as there was enough evidence to support the findings of facts by the Tribunal. But the three judges of the Federal Court gave different reasons for disallowing *certiorari.* Ong C.J. merely rejected the application on the ground that there was enough evidence to support the findings of facts by the Tribunal. Ali F.J. considered that the relevant question in that case was not whether the appellants had or had not the right of appeal but whether the Rent Tribunal was performing judicial or quasi-judicial function. Certiorari would lie if it was and would not lie if it was not. Ong Hock Sim F.J. was the only judge to hold unequivocally that the "normal rule" was that certiorari would not lie where there is an alternative remedy. Thus according to the learned Senior Federal Counsel the courts in this country had for 21 years from 1951 to 1972 consistently held that certiorari would not lie when an alternative remedy by way of appeal was available until he said in 1983 when *Lai Cheng Cheong* v. *Sowaratnam*[5] took a different view. In that case the appellant applied for leave to apply for an order of certiorari to quash the decision of a Labour Officer. The Attorney-General by way of a Notice of Motion opposed the application for leave on the ground that appellant had not exhausted his right of appeal to the High Court under section 77(1) and (2) of the Employment Ordinance 1955. Leave was refused by the High Court. On appeal, the Federal Court held that an applicant for certiorari was not normally obliged to have exhausted his right of appeal within the administrative hierarchy nor need he have exhausted his right of appeal to a court of law.

It would appear that the Federal Court in *Sowaratnam* was persuaded by the pronouncement in *The King* v. *Wandsworth Justices*[6] appearing at page 284 where Viscount Caldecote C.J. said:

> "As to the right of appeal to quarter sessions, it may be that the applicant could have had his remedy if he had pursued that course, but I am not aware of any reason why, if in such circumstances as these, he preferred to apply for an order of *certiorari* to quash his conviction, the court should be debarred from granting his application."

The Federal Court also referred to *Wade's* Administrative Law, Fourth Edition at pages 36-38 where the following also appears:

> "Rights of appeal are always statutory. Judicial review, on the other hand, is the exercise of the court's inherent power to determine whether action is lawful or not and to award suitable relief."

But most probably the Federal Court relied on the challenge of jurisdiction as the basis for the exceptional treatment of the application. This would seem to be indicated by the reference made to the speech of Lord Pearce dealing with general jurisdiction of the courts in the administration of justice in *Anisminic* v. *Foreign Compensation Commission.*[7] Therefore in *Sowaratnam* although the application before the court was only for leave and an in-depth study of the statement was not really warranted, the principle followed was the same as stated in *Regina* v. *Special Commissioners of Income Tax (ex-parte Morey)*[8] by Lord Widgery C.J. in his judgment at pages 72-73:

> "On the other hand, when there is an alternative and convenient form of appeal, it is not normally the practice of this Court to interfere unless the allegation of want of jurisdiction or breach of the rules of natural justice is a clear and simple case in which it is evident that to come here rather than pursue the more traditional lines of appeal is going to result in a saving of time or expense."

The learned judge referred to a number of English cases mostly on natural justice and concluded correctly that it was not an invariable rule that if an appeal lies to a higher tribunal the court will refuse the remedy of judicial review. Then he proceeded to ask the questions what are the circumstances where remedy would be available in spite of appeal procedures provided by Parliament. He said that since natural justice plays a prominent role in administrative law he was of the view that a breach of natural justice does fall within the exceptions. We can hardly quarrel with this general proposition. However, it can hardly be missed that in recent years the law on judicial review has made tremendous progress and the courts are now more

flexible in the use of the prerogative powers to check excess or abuse of powers. In *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal*[9] Lord Denning gave a short developmental history of the jurisdiction at page 69:

"The general rule is undoubted that the issue of certiorari is a matter of discretion for the High Court. This was distinctly stated by the court of King's Bench in 1793 in *Rex* v. *Bass* [(1973) 5 T.R. 251] and again in 1838 in *Reg.* v. *Manchester & Leeds Railway Co.* [(1938) 8 A. & E. 413, 428]. Since that time a subsidiary rule has been laid down to the effect that where the applicant is party grieved, who has no other remedy, the court will grant it *ex debito justitiae*, see *Reg.* v. *Surrey Justices* ((1870) L.R. 5 Q.B. 466); *Reg.* v. *Manchester Legal Aid Committee* ([1952] 2 Q.B. 413; [1952] 1 T.L.R. 476; [1952] 1 All E.R. 480). But if he is not a party grieved, or if, being a party grieved, he has another remedy, as, for instance, by appeal, *then the discretion of the court remains intact to grant or refuse the order.*"

(emphasis provided)

In *R.* v. *Chief Constable of Merseyside*[10] an investigating officer was appointed according to Police Regulations to investigate into certain complaints. However the subjects were not formally notified of the complaints as required by the Regulations. The regulations required the investigating officer to inform the subject in writing and as soon as practicable of the allegation or complaints and to warn him that any statement he made concerning the matter could be used in subsequent disciplinary proceeding. In the subsequent disciplinary proceeding the appellants contended that the delay in serving the notice under the Regulations was so prejudicial that it was unfair to continue the hearing. The Chief Constable rejected the contention and proceeded with the hearing. The appellants gave notice of appeal to the Police Appeal Tribunal. Before the hearing of the appeal the appellants applied for an order of certiorari to quash the Chief Constable's decision. In the Court of Appeal it was argued on behalf of the Chief Constable that the trial judge had correctly dismissed the application for judicial review not because it was premature but because another avenue of appeal was open to the applicant citing *R.* v. *Epping and Harlow General Commissioners*[11] where it was held that it is a cardinal principle that save in the most exceptional circumstances the review jurisdiction will not be exercised where other remedies are available and had not been used by the applicant.

In *R.* v. *Chief Constable of Merseyside* Sir John Donaldson M.R. reviewed a number of recent authorities ending with *Preston* v. *IRC*.[12] At pages 261-262 he gave a clear outline of the law on the subject:

"This, like the other judicial pronouncement on the interrelationship between remedies by way of judicial review on the one hand and appeal procedures on the other, is not to be regarded or construed as a statute. It does not support the proposition that judicial review is not available where there is an alternative remedy by way of appeal. It asserts simply that the court, in the exercise of its discretion, will very rarely make this remedy available in these circumstances.

In other cases courts have asserted the existence of the discretion, albeit with varying emphasis on the reluctance to grant judicial review. Thus in *R.* v. *Paddington Valuation Officer, ex p. Peachey Property Corp Ltd.* [1965] 2 All E.R. 836 at 840, [1966] 1 Q.B. 380 at 400, Lord Denning M.R., with the agreement of Danckwerts and Salmon L.JJ., held that certiorari and mandamus were available where the alternative statutory remedy was 'nowhere near so convenient, beneficial and effectual.' In *R.* v. *Hillingdon London Borough, ex p. Royco Homes Ltd.* [1974] 2 All E.R. 643 at 648, [1974] 1 Q.B. 720 at 728 Widgery C.J. said: '... it has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy.' In *R.* v. *Hallstrom, ex P.W.* [1985] 3 All E.R. 775 at 789-790, [1985] 3 W.L.R. 1090 at 1108 Glidewell L.J., after referring to this passage said:

> 'Whether the alternative statutory remedy will resolve the question at issue fully and directly, whether the statutory procedure would be quicker, or slower, than procedure by way of judicial review, whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body, these are amongst the matters which a court should take into account when deciding whether to grant relief by way of judicial review when an alternative remedy is available.'

Finally, the approach is, I think, consistent with *Preston* v. *IRC* [1985] 2 All E.R. 327 at 337-338, [1985] A.C. 835 at 862, where Lord Templeman said:

> 'Judicial review process should not be allowed to supplant the normal statutory appeal procedure [but] present circumstances are exceptional in that the appeal procedure provided by s.462 cannot begin to operate if the conduct of the commissioners in initiating proceedings under s.460 [which relates to the cancellation of tax advantages] was unlawful.'

In the same appeal Lord Scarman said [1985] 2 All E.R. 327 at 330, ([1985] A.C. 835 at 852):

> 'But cases for judicial review can arise even where appeal procedures are provided by Parliament. The present case illustrates the circumstances in which it would be appropriate to subject a decision of the commissioners to judicial review. I accept that the court cannot *in the absence of special circumstances* decide by way of judicial review to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair. But circumstances can arise when it would be unjust, because it would be unfair to the taxpayer, even to initiate action under Pt.

XVIII of the 1970 Act.' (Lord Scarman's emphasis)."

A clear principle is reiterated here *i.e.* it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.

In Re Preston was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists *except in very exceptional cases.*

In answer to the first question we would therefore hold that the discretion is still with the courts but where there is an appeal provision available to the applicant certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

Now we come to the second question posed to us that is whether on the evidence as were available to the learned judge he was justified in arriving at his conclusions on the grounds of relief.

In order to appreciate the true relationship between the respondent and the second appellant we have to go to the background facts in some detail. In his written judgment the learned judge started off with the date of the raid on the respondent's premises by the Income Tax Department on August 21, 1984. However it would appear quite clearly that communication between the respondent and the second appellant started at least as early as September 25, 1982.

Paragraphs 1, 2, 3, 4, 5 and 8 and 9 of the affidavit of the respondent dated November 14, 1985 summarised the complaints of the respondent:

"1. I am under investigation by the Inland Revenue Department since 21.8.84 when my office was raided and a great number of my documents were taken away by officers from the Inland Revenue Department led by Mr. Asokumaran, an enforcement officer attached to the department.

2. I have since then been given time to file my accounts from 1977 to 1984 and my accounts are now almost ready for submission.

3. In the interim, however, certain events have occurred as a result of which I made a report on or about 4.10.85 to the Anti-Corruption Agency. My report involved certain acts of Mr. Asokumaran, the enforcement officer in charge of my matter and his statement together with the statements of his colleagues were taken by the Anti-Corruption Agency on or about the 5.10.85.

4. On 11.10.85 I received these notices of assessment for 1979 to 1984, assessing income payable by me for the past years and the year 1984 at a sum of over $1,000,000/-. These notices were issued by Mr. Asokumaran after his statements were recorded by the Anti-Corruption Agency as a result of my report against him.

5. The accounts demanded by Mr. Asokumaran are for a period of 8 years and involve thousands of my files. I have told Mr. Asokumaran that I required a great deal of time to prepare the accounts and the department has given me time and the progress of my accounts has been progressively shown to Mr. Asokumaran. He has been aware towards the end of September, 1985 that my accounts were almost ready."

"8. In fact, Mr. Asokumaran's estimation is based only on conjecture and he has no idea of my nett income.

9. In view of the events that occurred on 4.10.85 and 5.10.85 and in view of my report to the Anti-Corruption Agency which implicated Mr. Asokumaran in a complaint of corruption, Mr. Asokumaran maliciously and vindictively assessed me for tax exceeding $1,000,000/– hoping to exculpate himself from the Anti-Corruption Agency's investigations and possible subsequent charges."

As early as September 25, 1982 the Department of Inland Revenue Ipoh wrote to the respondent requesting him to submit the balance sheet of his business as at December 31, 1979. The respondent failed to comply with the request. On October 4, 1983 the Department sent a final notice under section 81 of the Income Tax Act 1967 requesting the same. The respondent did not comply with this notice either. It is to be noted that failure to comply with this notice constitutes an offence under section 120 of the Income Tax Act. On August 21, 1984 a team of officers from the Inland Revenue Department Ipoh went to the respondent's office and took possession of a number of files, books and documents belonging to the respondent. On March 8, 1985 final notices were sent to the respondent which again were not complied with by the respondent.

The notice dated March 8, 1985 required the respondent to submit particulars stated therein within 30 days of the date of notice. The respondent and his tax agents asked for extension of time on a number of occasions as evidenced by letters dated July 2, 1985, July 3, 1985, July 13, 1985, August 12, 1985, and September 2, 1985, addressed to the Department of Inland Revenue and for attention of the second appellant. The request for

extension of time was granted by the Department. The letter dated August 12, 1985, reads:

"Dear Sir,

Jagdis Singh Sandu

Further to Mr. Sandu and our Mr. Loh's visit to your office a few days ago, where by the former extracted some valuable figures in his old records, we wish to advise that in the absence of any unforseen development we should be able to submit at least the profit and loss accounts for the relevant periods if not all the accounts and statements required by your office before the end of this month.

Once again we wish to apologise for not being able to submit the accounts and statements towards the end of last month."

The letter dated September 2, 1985, reads:

"Dear Sir

Jagdis Singh Sandu

Further to our letter dated August 12, 1985, we regret to advise that due to the sudden sickness of a number of staff of Sandu & Co. as well as our firm, we have not been able to complete the profit and loss accounts and the supporting documents for the period under consideration. Accordingly, we request for a further extension of one week to complete the above.

Any inconvenience caused is deeply regretted."

On August 12, 1985, the respondent and his tax agents went to the Inland Revenue office to obtain information regarding his tax affairs. During the visit the respondent asked the second appellant whether the second appellant had requested for $100,000 through one Manjeet Singh to settle the case. The second appellant replied he did not know who Manjeet Singh was and advised the respondent to lodge a police report. The second appellant himself lodged a police report two days later after consulting his superior officer who had been on leave until August 14, 1985. On September 2, 1985, the respondent's accountant again wrote for a further extension of one week. In the meantime the second appellant received instructions from his superior officer to raise the necessary assessments as the matter had been pending for a long time. This is evidenced in the note dated July 15, 1985, on letter dated July 13, 1985, note dated August 14, 1985, on letter dated August 12, 1985 and note dated September 3, 1985, on letter dated September 2, 1985 (Part B, pages 24, 26, 27).

The note addressed to the second appellant on letter dated August 12, 1985, reads:

"I think there should be no more excuses or extensions of time. After the end of this month issue protective assessments on a reasonable estimate."

And on letter dated September 2, 1985, the note reads:

"This 'bull shit' has gone on long enough. Issue protective assessments immediately to protect Revenue interests."

On October 2, 1985, the respondent's files were handed to the Examiner for purposes of computing the tax – (Part B, page 47). On October 4, 1985, the respondent lodged a report to the Anti-Corruption Agency but this report was however never exhibited although referred to in the affidavit. The second appellant was interviewed by an officer of the Anti-Corruption Agency the following day. Nothing however seems to have come out of this.

On October 8, 1985, the notices of assessment were printed out by the computer with the date of the notices as October 21, 1985. These notices of assessment were posted to the respondent's residential address, that is Lot 42355 Persiaran Tiger, Ipoh. The notices were received by the respondent on October 11, 1985. On October 24, 1985, the respondent lodged the notices of appeal to the Special Commissioners which appeals are still pending.

Much was said about the residential address written on the notice of additional assessment whereas the official address of the respondent in all his correspondences was different. This in our view has been satisfactorily explained by the appellants in that the residential address was the address recorded by the computer as being the address first received in the income tax return of the respondent.

One thing which is clear from the chronology of events referred to earlier is that the Inland Revenue Department had in fact co-operated with the respondent in order to enable him to prepare his accounts. This was in fact admitted in one of the letters referred to. But it was the respondent who had neglected to perform his part. There is a duty to keep records and giving receipts in one's business affairs as required by section 82 of the Income Tax Act.

It is also clear that the action required of the second appellant by his superior officer as disclosed in the minutes addressed to him referred to earlier was under the circumstances completely

justified to protect revenue interests and the second appellant cannot be blamed for complying with the express instructions he received.

Unable as it were to make a proper assessment of the respondent's tax because of the failure of the respondent to comply with the various notices issued to him the Inland Revenue Department proceeded to compute the tax under section 91(1) of the Income Tax Act. That section reads as follows:

"The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within twelve years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year."

That section empowers the Director General to raise an assessment or additional assessment according to the best of his judgment.

The guideline to the best judgment assessment is to be found in *Commissioner of Income Tax, Central and United Provinces* v. *Laxminarain Badridas*[13] which appears in the judgment of the Privy Council at page 130:

"The officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guess-work. In that sense, too, the assessment must be to some extent arbitrary."

It was admitted that a fair amount of information relating to the affairs of the respondent's business was already with the Department of Inland Revenue (Part B, page 74). The respondent himself also admitted in his affidavit that he was asking to be allowed an average cost of about $600/- per file. The respondent himself admitted that there were about 6,000 files (Part B, page 58). Therefore we are unable to agree with the learned judge that the assessments are arbitrary. Neither do we agree that the assessments are based on conjecture or surmise. The true amount should be determined on appeal. The onus of proving to the Special Commissioners that the additional assessments are excessive or erroneous lies on the respondent vide paragraph 13 of Schedule 5 to the Income Tax Act.

As regards the other grounds specified in the statement we are also unable to find evidence to support these allegations. The learned judge said that the additional assessments were prepared on the first working day after the statements of the second appellant were recorded by the Anti-Corruption Agency and rushed off by the department to the respondent. This finding is not supported by evidence. In fact the minutes of the superior officer to the second appellant referred to earlier explained the timing of the assessment. The instruction to raise the additional assessments was given by the superior officer in August and September 1985, long before the respondent lodged his report to the Anti-Corruption Agency on October 4, 1985.

As regards the finding of the learned judge that the assessment was rushed to the applicant by ordinary post it is to be noted that the notices of assessment were dated October 21, 1985, and the appellant received them on October 11, 1985. The appellants have explained this satisfactorily in that every notice of assessment is purposely dated two weeks after the date the information is punched into the computer. All of us who are familiar with receiving notices of assessments from the Inland Revenue Department are also aware of this.

The onus is on the respondent to prove the allegations he made in his statement in support of the notice of motion. There is a presumption that the administration exercises its powers in good faith and for public benefit. Looking at the background facts referred to earlier we are not satisfied that the respondent had discharged the burden. The various inferences drawn by the learned judge cannot be supported by the facts.

Finally the judge was of the view that the refusal of the Inland Revenue Department to allow the standover of payment of tax is unjust. He said at page 37:

"With respect I cannot agree that it would be more just for the Applicant to pay over a million dollars of arbitrary assessment to the Government and await the decision of the Tribunal."

First, it is to be noted that the standover was not refused by the second appellant against whom the allegation of malice and vindictiveness was made but by his superior officer. Secondly, under the law the tax payable under a notice of assessment shall be due and payable at the place specified in the notice whether or not the person appeals against the assessment. The Director General, may, however, allow payments by instalments of such amount as he may determine (section 103(3) of the Income Tax Act).

We will therefore allow the appeal and set aside the order of the learned judge. Costs to the appellants here and below to be taxed. Deposit to be refunded.

Appeal allowed.

Solicitors: *L.H. Singh & Co.*

TINTA PRESS SDN. BHD. v. BANK ISLAM MALAYSIA BHD.

[S.C. (Salleh Abas L.P, Syed Agil Barakbah & Wan Hamzah S.C.JJ.) May 13 & December 23, 1986]

[Kuala Lumpur Supreme Court Civil Appeal No. 293 of 1985]

Practice and Procedure – Injunction – Interlocutory mandatory injunction – Application to dissolve and set aside injunction – Application dismissed – Power of Court to grant interlocutory mandatory injunction – Urgent and exceptional case – Balance of convenience – Specific Relief Act, 1950, s. 53 – R.H.C. 1980, O.29, r. 1(2).

Lease – Lease of equipment – Facility granted on Islamic banking business which included profit margin – Breach of agreement – Owner entitled to recover equipment.

In this case the respondents had leased certain printing equipment to the appellants. The appellants having defaulted in payment of the monthly rentals, the respondents brought an action to recover possession of the equipment and to recover the arrears of rent. The respondents also made an *ex parte* application for and obtained a mandatory injunction to enable the respondents to recover possession of the equipment. The appellants then applied to dissolve and set aside the mandatory injunction. This was refused (see [1986] 1 M.L.J. 256) and the appellants appealed.

Held: (1) the court has a discretion to grant an interlocutory mandatory injunction before trial but the discretion must be exercised and an injunction granted only in exceptional and extremely rare cases. The case must be unusually strong and clear in that the court must feel assured that a similar injunction would probably be granted at the trial on the ground that it would be just and equitable that the plaintiff's interest be protected by the immediate issue of an injunction, otherwise irreparable injury and inconvenience would result. Where the case is one of urgency an application can be made *ex parte;*

(2) the learned Judge on the facts and circumstances of the case rightly concluded that this was an exceptional case where the court was justified in granting a mandatory injunction on an *ex parte* application before the trial;

(3) the learned judge rightly concluded from the documents and the affidavit evidence that the agreement in this case was a lease agreement and not a loan agreement;

(4) there was a clear breach of the lease agreement in this case by the appellant and the respondent therefore became entitled to immediate possession of the equipment. The learned Judge was confident that the court would grant a mandatory injunction at the trial of the suit and rightly held that if the injunction had not been granted earlier the respondent would suffer irreparable damage and greater hardship. The balance of convenience was very much in favour of the respondent and the application was one of urgency. There was no unreasonable delay on the part of the respondent in filing the writ and the *ex parte* application for injunction;

(5) this was a case where the learned Judge was more than justified in granting a mandatory injunction on an *ex parte* application.

Cases referred to:

(1) *Wah Loong (Jelapang) Tin Mine Sdn. Bhd.* v. *Chia Ngen Yiok* [1975] 2 M.L.J. 109.
(2) *Sivaperuman* v. *Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 M.L.J. 150.
(3) *Gibb & Co* v. *Malaysia Building Society Bhd.* [1982] 1 M.L.J. 271, 273.
(4) *Shepherd Homes Ltd.* v. *Sandham* [1971] 1 Ch. 340, 349.
(5) *Credit Corporation (Malaysia) Bhd.* v. *K.M. Basheer Ahmad & Anor.* [1985] 1 M.L.J. 208, 210.

SUPREME COURT.

Dennis Xavier (*Vincent Chandran* with him) for the appellant.

Raja Abdul Aziz Addruse (*Mohamed Noor Haji Don* with him) for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): Earlier we dismissed this appeal with costs and made an order that the deposit of $500/- be paid to the respondent on account of costs. We considered the appeal on two main grounds, *viz.* (1) the legal issue and (2) the factual issue.

As regards (1), the question was whether the